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Via Electronic Mail

Ms. Madeline Van Nostrand

FOIA Officer

Office of Chief Counsel

Pipeline and Hazardous Materials Safety Administration (PHMSA)

U.S. Department of Transportation

1200 New Jersey Avenue, S.E.

Washington, D.C. 20590

Dear Ms. Van Nostrand,

We have received your letter dated April 21, 2017 regarding the Pipeline Safety Trust's request (dated September 23, 2014) to PHMSA for production of ExxonMobil Pipeline Company (EMPCo) records under the Freedom of Information Act (FOIA). The overly-broad requests generally sought, "All documents included in the case file[s] for [CPF No. 4-2013-5027 and CPF No. 5-2013-5007], as the term "case file" is defined in 49 CFR 190.209, and any material, including records, documents and other exhibits submitted to the Presiding Official before, during or after the hearing." The "consultation package" produced by PHMSA to EMPCo, identifies the specific documents, already designated by EMPCo as confidential/internal use only, which PHMSA is considering producing absent objection from EMPCo. These documents, however, are indeed confidential records/procedures that are exempt from disclosure.

EMPCo requests that PHMSA withhold the identified documents from production for the reasons stated herein. Specifically, under FOIA Exemption 4, trade secrets and confidential commercial information are exempt from disclosure, and the records in PHMSA's possession contain trade secrets and confidential information. In addition, Exemption 7 of FOIA precludes release of information that is part of an ongoing enforcement proceeding. The PHMSA order issued in connection with the Pegasus incident (CPF No. 4-2013-5027) remains open due to EMPCo's appeal, which is currently under review by the Fifth Circuit Court of Appeals. Until the appeal is fully adjudicated, and EMPCo's request for reversal or remand to the Agency for further proceedings is decided, CPF No. 4-2013-5027 remains open. As a result, all EMPCo records related to the Pegasus incident enforcement should be withheld.

FOIA Exemption 4

The EMPCo records in PHMSA's possession contain confidential trade secrets that are exempt from disclosure pursuant to FOIA Exemption 4. To determine whether the information is privileged or confidential, the courts first resolve the issue of whether the information was provided to the government voluntarily or if it was required to be provided. If voluntarily provided, there is a lower threshold to prevent disclosure under Exemption 4. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579, 123 L.Ed.2d 147 (1993). Under the test set forth in *Critical Mass*, the information provided to the government on a voluntary basis is "confidential" for purposes of Exemption 4 if it is the kind of information that would customarily not be released to the public by the submitter. *Id.* at 872. The records under FOIA consultation review in PHMSA's possession are excerpts of EMPCo's proprietary Threat Identification and Risk Assessment Manual and forms and excerpts from EMPCo's proprietary Integrity Management Program Manual, which

were voluntarily produced to PHMSA. EMPCo was under no order or obligation to produce the subject materials at any time.

In addition, the materials qualify as trade secrets. "Trade Secret" is generally defined as any confidential formula, pattern, process, device, information or compilation of information that is used in a person's business, and that gives the person an opportunity to obtain an advantage over competitors who do not know or use it. See, e.g., 29 CFR 1910.1200; *Computer Associates Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996); and *Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763, 776 (Tex. 1958) (quoting Restatement of Torts § 757 (1939)). The materials at issue contain confidential and proprietary information and processes that were specifically developed for and used in EMPCo's business, and that give EMPCo an opportunity to obtain an advantage over competitors that do not have access to such information.

These manuals and processes were developed with the assistance of pre-eminent third-party experts in the fields of threat identification, risk assessment, and integrity management, who were specifically hired to help develop world-class processes and procedures to help EMPCo become industry leaders in threat identification, risk assessment and integrity management. These manuals and procedures have undergone numerous revisions, involving countless internal hours and resources, allowing EMPCo to remain industry leaders in these business critical areas. These materials have been consistently maintained as proprietary and not publically released for more than a decade. To our knowledge, no other pipeline company has publicly released similar proprietary manuals.

For the same reasons, the information also qualifies as confidential commercial information under FOIA Exemption 4. As PHMSA has noted, the court in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) held that commercial or financial information is confidential for FOIA purposes if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information is obtained. This standard requires a showing of actual competition and the likelihood of substantial competitive injury. See *Lepelletier v. F.D.I.C.*, 977 F.Supp. 456 (D.D.C. 1997), aff'd in part, rev'd in part on other grounds, 164 F.3d 37 (D.C. Cir. 1999). It is not necessary to show actual competitive harm or the certainty of that harm; rather, actual competition and the likelihood of substantial competitive injury are all that need be shown. See *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004); *National Community Reinvestment Coalition v. National Credit Union Admin.*, 290 F.Supp.2d 124 (D.D.C. 2003).

With regard to actual competition for EMPCo, there is no doubt that EMPCo is one of many midstream pipeline companies in North America competing in the pipeline business. For example, the D.C. Circuit Court in *Mobil Pipe Line Company v. FERC*, 676 F.3d 1098 (D.C. Cir. 2012) already specifically held that "producers and shippers of Western Canadian crude oil have numerous competitive alternatives...for transporting and selling their crude oil." Indeed, the underlying conclusion of the court was that EMPCo had so many competitors that it would be unable to charge anything but a competitive rate on the subject tariff. As a result, the courts have already determined that EMPCo faces actual competition. Freely disclosing EMPCo's confidential and proprietary work product, especially considering the lack of disclosure from other competitors' procedures and manuals, on its face, puts EMPCo at a significant competitive disadvantage. As a result, public disclosure of the manual excerpts, including to operators that compete with EMPCo, presents the likelihood of substantial competitive injury to EMPCo. See *above discussion on Trade Secrets*. In sum, the EMPCo materials requested are exempt from FOIA as both trade secrets and confidential commercial information.

FOIA Exemption 7


Exemption 7 to FOIA disclosure, 5 U.S.C. Section 552(b)(7), precludes disclosure of information subject to ongoing investigation and enforcement. Disclosure of the responsive material could cause articulable harm, and deprive the Company of its right to an impartial adjudication, violating Section 552(b)(7)(A) and (B). Specifically with regard to CPF No. 4-2013-5027, the matter is still pending adjudication at the Fifth Circuit Court of Appeals. As PHMSA is fully aware, EMPCo's appeal challenging the Final Order in CPF No. 4-2013-5027 remains pending in federal court, and the premature disclosure of materials associated

with this enforcement proceeding before the Court has reached a decision on the merits would be inappropriate and violative of 5 U.S.C. Section 552(b)(7).

We appreciate the opportunity you provided to review the materials in the consultation package for potential FOIA Exemptions prior to production, and respectfully request that PHMSA withhold production of the materials under Exemptions 4 and 7 of FOIA. Should PHMSA disagree with our analysis, we also request that PHMSA provide us with the requisite time to protect our rights under the law.

Thank you for consideration in this matter.

Sincerely,



Johnnie R. Randolph Jr.